

Legal Constraints to the European Union's Accession to the International Maritime Organization

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I

INTRODUCTION

There is no doubt that the European Union (EU) has become a global actor. The global or international context in which the EU has sought to define its identity, promote its interests and construct its policies, is increasingly seen as the stage on which the EU must act.¹ Frank Hoffmeister indicates that, the EU has been actively involved in most of the significant international organizations, though many of these organizations have been less flexible regarding the full membership of the EU.²

In 2010, the European Economic Area (EEA=EU+Norway, Iceland and

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¹ M. Cremona, 'The Union as a global actor: roles, models and identity', 41 Common Market Law Review 553 (2004).

² F. Hoffmeister, 'Outsider or frontrunner? Recent development under international and European law on the status of the European Union in international organizations and treaty bodies', 44 Common Market Law Review 41-68 (2007).

Liechtenstein) registered tonnage came to some 209 million gross tonnage on a total world tonnage of 916 million gross tonnage. Overall the EEA controls 41,6% of the global commercial fleet measured in gross tonnage.³ The increasing effectiveness of the involvement of the EU in the International Maritime Organization (IMO) is a strategic goal of the EU.⁴ Even though a large volume of EU legislation on maritime transport (e.g. Erika I, II, III packages) has been adopted in the past decade,⁵ the EU's role in the IMO is still very limited. Currently, the EU is not a member of the IMO, neither is the EU a contracting party to most international conventions adopted under the auspices of the IMO (IMO Conventions), e.g. International Convention for the Prevention of Pollution from Ships (MARPOL), International Convention for the Safety of Life at Sea (SOLAS) etc. The European Commission (the Commission) does however hold observer status in the IMO and has appointed a permanent representative to the IMO. Nonetheless, the Commission is not satisfied with this situation. For this reason, the Commission recommended to the Council of the European Union (the Council) in 2002 that the EU should accede to the IMO as a full member.⁶ This has received political support from the European Parliament (the Parliament), most notably in its Resolution on Improving Safety at Sea

³ European Community Shipowners' Association Annual Report 2009-2010

⁴ Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final, 7.

⁵ For details about European legislation on maritime safety during the past decade, see N.Y. Liu and F. Maes, 'The European Union's role in the prevention of vessel-source pollution and its internal influence', 15 Journal of International Maritime Law 411-422 (2009).

⁶ Recommendation from the Commission to the Council, in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, SEC(2002)381 final

(2003/2235(INI)).⁷

In our previous paper, we argue that a reinforced internal coordination process, rather than a full membership, may be a better and more realistic solution for the EU to exert its influence on international decision making processes within the IMO.⁸ As a follow-up to that paper, this paper pays further attention to the interaction between the EU and the IMO. Potential legal constraints of the EU's accession to the IMO as well as the IMO Conventions are analyzed. It first explores the external legal constraint. The questions discussed in this section are: 1) What are the requirements for the EU to become a full member of the IMO? 2) How can the EU persuade other Members of the IMO for the EU's accession? 3) Will the EU get an additional vote in the IMO decision making process or will the EU vote on behalf of its Member States? 4) What are the requirements for the EU to be a contracting party of IMO Conventions? If the EU is admitted as a contracting party of the IMO Conventions, does it aggregate the entire EU tonnage as far as its ratification and the entry into force of the treaty is concerned? The second part of the paper addresses internal legal constraint. It briefly describes the recent developments of the EU's expansion of its external competence towards Member States in the field of maritime transport. Then it sheds light on the following question: In case the EU would be a party to the IMO and IMO Conventions, what can a Member State do if it has an issue of vital importance which will not be moved on by the EU?

⁷ See para. 34, the Parliament reiterates its request to the Council to apply for membership of the IMO for the Union, http://www.europarl.europa.eu/comparl/tempcom/mare/pdf/res_en.pdf

⁸ N.Y. Liu and F. Maes, 'The European Union and the International Maritime Organization: EU's external Influence on the Prevention of Vessel-Source Pollution', 41 JML&C 581-594 (2010)

II

EXTERNAL LEGAL CONSTRAINTS

A. *IMO Decision Making Process*

The main purposes of the IMO is to provide a platform for co-operation among governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.⁹ Originally the functions of the IMO were to be only ‘consultative and advisory’. With the entry into force of the 1982 amendments to the Convention on the International Maritime Organization (IMO Convention), the IMO can also perform functions ‘assigned to it by or under international instruments relating to maritime matters and the effect of shipping on the marine environment’.¹⁰ The expression “competent international organization” in singular in the United Nations Law of the Sea Convention (LOSC) applies exclusively to IMO, bearing in mind the global mandate of the Organization as a specialized agency within the United Nations system established by the IMO Convention.¹¹ The formal sessions of negotiating committees produce debate and decisions, but the general IMO approach

⁹ Art. 1(a), Convention on the International Maritime Organization

¹⁰ Art. 2(d) of the IMO Convention.

¹¹ IMO LEG/MISC/6, 10 September 2008, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, a study by the Secretariat of the IMO”, 7.

is to establish treaties by consensus.¹² The IMO has improved its procedures over the years to ensure that changes can be introduced more quickly after the adoption of legally binding international instruments, mainly annexes to conventions. One of the most successful of these has been the process known as "tacit acceptance". It means that the body which adopts the amendment to an annex by a majority vote, at the same time fixes the entry into force and the time period within which the contracting parties will have the opportunity to notify their rejection of the amendment, or to remain silent on the subject. A decision taken by a majority will be binding for States that did not support the decision, unless they explicitly opt out within the time period foreseen. In case of silence the amendment is considered to have been accepted by the party.¹³ The procedure is so popular that it is incorporated in many important IMO conventions such as MARPOL and SOLAS.

B. The EU's Interaction with the IMO

a. The EU's Interaction with the IMO Convention

According to the Convention on the International Maritime Organization (IMO Convention), Membership in the Organization shall be open to all States.¹⁴ Therefore, the only means of securing accession by the EU is to amend the IMO Convention by inserting a clause allowing regional economic integration organizations (REIO)¹⁵ to

¹² N. Gaskell, 'Decision Making and the Legal Committee of the International Maritime Organization', 18 International Journal of Marine and Coastal Law, 186 (2003).

¹³ IMO LEGXII / 8 Annex II, 8.

¹⁴ Art. 4, the IMO Convention.

¹⁵ The Concept has emerged from multilateral treaty practice, especially to permit an organization like the European Union to adopt multilateral treaties and conventions as a contracting party alongside

become a party to the Convention and by adapting all the relevant articles of the Convention affected by this clause, including the rules of procedure.¹⁶

In theory, it is possible to add a REIO clause in the IMO Convention. This was done by the Food and Agricultural Organization (FAO) in 1991. The EU (at that time the European Community) was allowed to become a member through amending the FAO Constitution. However, first we must bear in mind that the EU has exclusive competence in this field based on the Common Fisheries Policy,¹⁷ and it has only a shared competence in the field of maritime transport. Moreover, legal constraints can be analyzed as follows.

The amendment of the IMO Convention shall be adopted by a two-thirds majority vote of the Assembly. Currently, the Assembly is made up of 169 Member States who generally meet once every two years.¹⁸ The EU must therefore persuade at least 113 out of 169 States to ratify the amendment. But what are the benefits for other States in case of the EU's accession to the IMO? It is argued by Veronica Frank that the EU's participation in the IMO's decision-making might, in principle, discourage future EU regional initiatives and strengthen consistency between European and international

States. The substance of what is today usually known through the term REIO originates in the UN Convention on the Law of the Sea which, pursuant of its article 305(1) (f), is open to signature to a certain category of international organizations defined in its Annex IX. For more discussion and a few generic propositions of the REIO, see E. Paasivirta and P.J. Kuijper, 'Does One Size Fit All? : The European Community and the Responsibility of International Organizations', 36 Netherlands Yearbook of International Law (2005) 204-212.

¹⁶ www.imo.org

¹⁷ For details about Common Fisheries Policy, see S. B. Suominen, 'The European Community, the European Court of Justice and the Law of the Sea', 23 International Journal of Marine and Coastal Law, 648-663 (2008).

¹⁸ <http://www.imo.org/About/Pages/FAQs.aspx>

standards. Moreover, with the EU ratification, the IMO Conventions would become an integral part of EU law, which is equipped with strong enforcement mechanisms. This might ensure better compliance with IMO standards in European waters and ports.¹⁹ Assisted by the European Maritime Safety Agency (EMSA), the Commission frequently issues several reasoned opinions to Member States,²⁰ and does not hesitate to take Member States to the European Court of Justice (ECJ) for not complying with EU legislative acts on maritime matters. However, it is doubtful whether the EU's accession to the IMO will eliminate the regional or unilateral action of the EU.

In 1963, the case *van Gend en Loos v. Nederlands Administratie der Belastingen* decided that the European Community constitutes a new legal order of international law.²¹ Further, the ECJ managed to separate European law from international law by its statement in the case *Costa v. ENEL*. It is declared that by contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which on the entry into force of the treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply.²² In addition, the recent *Kadi* case of the ECJ to some extent shows that the robustly pluralist approach of the ECJ to the relationship between EU law and international law represents a sharp

¹⁹ V. Frank, 'Consequence of the Prestige Sinking for European and International Law', 20 *International Journal of Marine and Coastal Law*, 27 (2005).

²⁰ Infringement proceedings of maritime transport from 2005 to 2009, http://ec.europa.eu/transport/infringements/proceedings/maritime_en.htm

²¹ T. C. Hartley, 'International Law and The Law of the European Union - A Reassessment', in J. Crawford and A.V.Lowe, (eds.) *2001 British Yearbook of International Law*, (Oxford University Press, 2002) 11.

²² M. Szabo, 'The EU under Public International Law: Challenging Prospects', *Cambridge Yearbook of the European Legal Studies* (2007-2008), 304.

departure from the traditional embrace of international law by the EU.²³ The relation between EU law and international law is still under discussion.²⁴ Nevertheless, there is no doubt that the EU has both the authority and the capacity to act alone.

There are mainly two internal incentives for the development of the EU maritime safety legislation which cause “unilateralism” concern²⁵ by the rest of the world. First, impatience with the IMO system has grown in Europe.²⁶ It is believed by the EU that the normal framework for international action on maritime safety under the auspices of the IMO falls short of what was needed to tackle the causes of disasters such as the Erika effectively.²⁷ The IMO is sometimes alluded to as a toothless tiger as it is not authorized to implement and enforce its conventions and resolutions. Moreover, it normally takes many years for new conventions, protocols, annexes and amendments to enter into force due to a double condition: a number of States and those States need to represent a certain level of gross tonnage in the world. Second, the main incentive for the adoption of the Erika I and Erika II packages is the strength of public

²³ G. de Burca, ‘The European Court of Justice and the International Legal Order After Kadi’, 51 *Harvard International Law Journal*, 1 (2010). See also J. W. V. Rossem, ‘Interaction between EU Law and International Law in the light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community’, *Netherlands Yearbook of International Law* (2009), 183-227.

²⁴ For more about the discussion, see e.g. E. Somers and G. Gonsaeles, ‘The Consequences of the Sinking of the M/S Erika in European Waters: Towards a Total Loss for International Shipping Law?’, 41 *Journal of Maritime Law and Commerce*, 57-83 (2010). M. Lickova, ‘European Exceptionalism in International Law’, 19 *European Journal of International Law*, 463-490 (2008). N. Lavranos, ‘Protecting European Law from International Law’, 15 *European Foreign Affairs Review*, 265-282 (2010).

²⁵ A. Boyle, ‘EU Unilateralism and the Law of the Sea’, 21 *International Journal of Marine and Coastal Law*, 15-31 (2006).

²⁶ A. K. Tan, *Vessel-Source Marine Pollution, the Law and Politics of International Regulation* (Cambridge University Press, 2006) 88.

²⁷ COM (2000) 142 final, 4.

opinion following this oil tanker spill disaster. Political pressure and public opinion after dreadful casualties have prompted the EU to highlight the need to tighten the net in relation to vessel-source pollution and eliminate the discrepancies in the implementation of MARPOL among EU Member States.²⁸ Furthermore, with ever closer integration being forged among EU Member States, supra-national institutions like the Commission are increasingly assuming an activist stance, seeking greater competence to initiate legislation for the EU.²⁹

Therefore, the EU's membership of the IMO cannot substantially guarantee the elimination of unilateral or regional action of the EU, especially if an unexpected disaster happens in the future. After being a member of the IMO, the EU may risk losing some flexibility under international law since the EU may concern more about the international legal framework.³⁰ But would these reasons be sufficient to convince other IMO members to go through the complex and very slow ratification process?³¹ For the EU's accession to the IMO Convention, the EU seems to be overly assured of its economic power as a regional bloc without considering substantial benefits for other nations.³²

²⁸ N. Y. Liu and F. Maes, 'Criminal Liability and Vessel-Source Pollution in the European Union and the United States: Inspirations for the Prevention of Vessel-Source Pollution in China?' in M. Faure, L. X. Han and H. J. Shan eds, *Maritime Pollution Liability and Policy China, Europe and the US*, (Kluwer Law International 2010), 199.

²⁹ See supra note 26, 86-87.

³⁰ See supra note 8, 592-594.

³¹ See supra note 19, 27.

³² "As third countries cannot afford to ignore such a commercially important market, they will be obliged to familiarize themselves with and as far as possible conform to the rules in force in the European market. The safety requirements imposed by the Community in accordance with IMO rules are gradually becoming de facto professional practice for all vessels operating in the European area. This added value

b. The EU Interacts with the IMO Conventions

Generally speaking, most of the IMO Conventions do not allow the EU to become a contracting party. The only exception is the 2002 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, which includes a clause permitting the EU's membership.³³ The EU could become a party to most of the IMO Conventions by amending these conventions to insert a REIO clause first. This requires support by two-thirds of the Parties to the Conventions. Art.16 (d), MARPOL provides that amendments shall be adopted by a two-thirds majority of only the Parties to the Convention present and voting. Art.16(f)(i) states that an amendment to an article of the Convention shall be deemed to have been accepted on the date on which it is accepted by two thirds of the Parties, the combined merchant fleets of which constitute not less than 50% of the gross tonnage of the world's merchant fleet (tacit acceptance). The procedure can be more complicated if the amendment is considered by a Conference of Parties. The Conference of Parties can decide that the normal ratification process is necessary for the entry into force of the amendment and the "tacit acceptance" may not be applicable.³⁴ The increasing volume of the EU legislation in the field no doubt strengthens the legal arguments in favor of EU participation in those instruments.³⁵ It is believed that the EU is well placed to push for change in order to achieve a comprehensive international regulatory framework for

should be reflected in a more appropriate status commensurate with the evolution of powers". SEC (2002) 381 final, 38-39.

³³ For more details, see H. Ringbom, *The EU Maritime Safety Policy and International Law*, (Martinus Nijhoff, 2008), 100.

³⁴ Art.16 (3)(c), MARPOL.

³⁵ Supra note 33, 91.

shipping, suited to face the challenges of the 21st century.³⁶ However, once again, it will be a very difficult process. Assuming that the EU succeeds in inserting the REIO clause and is allowed to be a contracting party, two potential issues can be discussed.

First, the slow entry into force of IMO conventions is one of IMO's systemic deficiencies.³⁷ On average, the process of ratifying an IMO Convention takes from 8 to 10 years.³⁸ As recommended by the Commission, the EU and the Member States should work towards a better mechanism for rapid ratification of IMO conventions at world level.³⁹ The question is: will the EU aggregate the entire EU tonnage as far as its ratification and the coming into force of the treaty is concerned? From a legal point of view, the EU's potential contribution seems not be that substantial. Each IMO convention has its own conditions which have to be met for coming into force: the number of ratifications and the representation of world's gross tonnage are two main issues.⁴⁰ European companies own 41% of the world's total fleet (in dwt).⁴¹ Nonetheless, in case the EU becomes a contracting party of an IMO Convention which has not yet entered into force, e.g., International Convention for the Control and Management of Ships' Ballast Water and Sediments, it will play a very limited role on the entry into force of that Convention. This is because the EU itself does not represent any world's gross tonnage. Even nowadays the EU has become a supranational power and acquired competence from its Member States, in the

³⁶ COM (2009) 8 final, 10.

³⁷ Supra note 26, 348.

³⁸ SEC (2002)381 final, 35.

³⁹ COM(2009) 8 final, 10.

⁴⁰ Z.O. Ozcayir, 'IMO Conventions: The Tacit Consent Procedure and Some Recent Examples', 10 (2004) Journal of International Maritime Law 205.

⁴¹ Supra note 3. See also COM(2009) 8 final, 2.

shipping world, there is no ship sailing with a single European flag. The EU failed to establish a common ship register in the 1990s.⁴² The world's gross tonnage is mainly registered in States not affiliated with the EU. Consequently, the EU's ratification of an IMO Convention may be a political incentive for other States to ratify, but it cannot contribute substantially to the rapid entry into force of relevant IMO Conventions. Moreover, ratification of the EU may not be counted in addition to the ratifications by the EU Member States. This was the case when the EU ratified the Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1997.⁴³

Secondly, as a contracting party of the IMO Conventions, it is reasonable for the EU to have a voting right within the conventions' framework. Subsequently, the question may arise as to whether the EU will have a vote in addition to that of its Member States. In theory, in a mixed agreement where both the EU and Member States are parties to the same Convention, the right to vote follows the division of powers between the EU and its Member States. In the Conference of Parties, the EU (normally represented by the Commission) votes for the EU with 27 votes in areas of the EU competence, the Member States keep silent. In areas of Member State competence, the Member States could delegate their voting power to the Presidency according to a common position or vote individually; the EU keeps silent.⁴⁴ This is already well operated in other international organizations, where the EU is a full member.⁴⁵ With its own voting right, the EU may strengthen its internal coordination

⁴² Supra note 35, 32-34.

⁴³ <http://www.basel.int/ratif/ban-alpha.htm>

⁴⁴ Supra note 2, 57.

⁴⁵ E.g., the EU's practice in the Food and Agriculture Organization (FAO). See [http://ec.europa.eu/](http://ec.europa.eu/delegations/delita/our_activities_in_rome/ec_status.htm)

[delegations/delita/our_activities_in_rome/ec_status.htm](http://ec.europa.eu/delegations/delita/our_activities_in_rome/ec_status.htm)

process and vote on behalf of 27 EU Member States. Nevertheless, for other parties of the IMO Convention, it will be quite hard to accept the idea that the EU will have an additional vote.

III

INTERNAL LEGAL CONSTRAINTS

A. Recent Developments

The EU competence is conferred by its Member States and further governed by the principles of subsidiarity and proportionality.⁴⁶ By accession to the LOSC, the EU declared that maritime transport, safety of shipping and the prevention of marine pollution are considered to be areas of shared competence between the EU and its Member States.⁴⁷ The EU action to combat marine pollution started with a Council Resolution of 26 June 1978. The reduction of pollution from shipping has formed an integral part of the EU maritime safety policy from its beginning in 1993.⁴⁸ Nonetheless, it was in the wake of the “Erika (1999)” and “Prestige (2002)” oil tanker disasters that the Commission became much more pro-active, since public opinion was no longer prepared to tolerate such accidents and there were calls for rigorous action at Community level, not least from the European Parliament and the Council of

⁴⁶ Art. 5, the Treaty on European Union (TEU)

⁴⁷ See Declaration Concerning the Competence of the European Community with regard to Matters Governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention, p.231, http://untreaty.un.org/unts/120001_144071/27/2/00022247.pdf

⁴⁸ COM (1993) 66 final

Ministers.⁴⁹ A series of European legislation has been enacted in the aftermath of “Erika” and “Prestige”. On 11 March 2009, the third maritime safety package was adopted by the European Parliament. This package covers legislation on flag state control, classification societies, port state control, vessel traffic monitoring, accident investigation, liability of passenger carriers and insurance.⁵⁰ It is then declared by the Commission that the EU now has one of the world’s most comprehensive and advanced regulatory frameworks for shipping.⁵¹ According to the AETR/ERTA (European Road Transport Agreement) principle developed by the European Court of Justice (ECJ), the Community acquires external competence when it adopts internal common act on the same subject-matter.⁵² Consequently, the EU has greatly expanded its external competence towards Member States in the field of maritime transport (prevention, control and compensation of vessels-source pollution).

B. Imbalanced Application of the “Duty of Loyalty”

It is believed by the Commission that, given the EU’s increasing powers and competences in the field of maritime safety, the EU participation in the IMO would appear justified. In particular, the Commission thinks that a stronger EU participation becomes necessary to prevent infringements by the Member States against their EU obligations and to guarantee the consistency of the EU position.⁵³ In order to join the IMO and the IMO Conventions, the Commission must first be mandated by the

⁴⁹ COM (2000) 142 final, 4.

⁵⁰ For details, see http://ec.europa.eu/transport/maritime/safety/third_maritime_safety_package_en.htm

⁵¹ COM (2009) 8 final, 7.

⁵² Para. 19, Case C-22/70, Commission v. Council, 1971 ECR.263

⁵³ SEC(2002)381 final, 35.

Council to negotiate with other Parties on behalf of the EU. The question is “how can the Commission persuade Member States to support EU’s accession to the IMO and the IMO Conventions”? “Speak in one voice” would seem to be the most important value for Member States in the event of the EU’s accession to the IMO and the IMO Conventions.⁵⁴ In addition, the ECJ, through *Commission v. Greece* (C-45/07) [2009] and *Commission v. Sweden* (C-246/07) [2010], has judicialized the “duty of loyalty” (Article 4(3) Treaty on the European Union (TEU)) and greatly restricted actions of Member States at the international level.⁵⁵ The judicialized principle of the “duty of loyalty” could however result in concerns for Member States.

It must be clear that the “duty of loyalty” applies equally for the EU institutions and for the Member States.⁵⁶ In various pronouncements, the ECJ has held that the “duty of loyalty” is triggered ‘where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and partly within that of the Member States.’ It operates ‘between the Member States and the Community institutions, both in the process of negotiation and conclusion, and in the fulfillment of the commitments of agreements or conventions entered into force’, and it is ‘for the Member States and the Community institutions to take all the measures necessary so as best to ensure such cooperation’.⁵⁷ In the case *Commission v. Greece*, the ECJ concluded that even if there had been a failure by the Commission in its performance

⁵⁴ As can be seen in White Paper, European Transport Policy for 2010: time to decide, COM (2001) 370, 12.09.2001, pp. 106-107, “By the EU’s accession to the IMO, 27-odd members of the enlarged Union not only speak with a single voice but, above all, can influence those organizations’ activities in the common interest and in support of sustainable development”.

⁵⁵ See *supra* note 8, 590-592.

⁵⁶ *Ireland v. Commission* (C-339/00) para.71.

⁵⁷ C. Hillion, ‘Mixity and coherence: The significance of the duty of cooperation’ in C Hillion and P Koutrakos (eds) *Mixed Agreements Revisited* (Hart Publishing 2010), 87-115.

of the duty of loyalty, this did not entitle the Member State to unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law.⁵⁸ Subsequently, the question is “how long Member States must refrain from acting individually in order to wait for the EU’s decision to act or not?” The ECJ’s judgment is silent on this issue in the *Commission v. Sweden*. The point where the Member States are allowed to act unilaterally in the absence of a final EU decision remains undefined. The ECJ seems reluctant to accept that a failure to act within a reasonable time limit on the part of the institutions automatically entitles a Member State to act at the international level.⁵⁹ Art. 265 of the Treaty on the Functioning of the European Union (TFEU) provides that should the European institutions, in infringement of the Treaties (TFEU and TEU), fail to act, the Member States and other institutions of the EU may bring an action before the ECJ to have the infringement established. However, this action shall be admissible only if the EU institution concerned has first been called upon to act.⁶⁰ It seems to be quite difficult for Member States to evoke Art. 265 to force the EU institutions to act on a specific issue. Until now, there has been no relevant case brought to the ECJ relating to the application of Art. 265. Therefore, in practice, the judicialized principle of “duty

⁵⁸ *Commission v. Greece* (C-45/07) para. 26. For details and comments of the case, see M. Cremona, ‘Extending the reach of the AETR principle: comment on *Commission v Greece* (C- 45/07)’, 34 *European Law Review* 754-768 (2009). See also *supra* note 63

⁵⁹ P. V. Elsuwege, ‘European Court of Justice – failure of a Member State to fulfill obligation – Breach of Article 10 EC; now Art. 4(3) TEU (duty of loyal cooperation) – Stockholm Convention on Persistent Organic Pollutants – Unilateral proposal by a Member State to list a substance in Annex A to that Convention’, 105 *American Journal of International Law* (2011) (forthcoming),

⁶⁰ Art. 265 (2), TFEU.

of loyalty” may only restrain unilateral Member States action and raises the question of a possible imbalance in the application of the mutual duty of loyalty.⁶¹

Drawing the discussion back to the EU’s accession to the IMO and the IMO Conventions, the concern of Member States is: in case the EU would be a party to the IMO and IMO Conventions, what can Member States do if they have an issue which is of vital importance to them, but will not be moved on by the EU, either because of lack of interest, or because of opposition from other EU Member States? As sovereign states, currently EU Member States can at least, in theory, act in an autonomous manner within the IMO. Even though Member States’ competences have been drastically limited by the expansion of European legislation during the past decade, they still have shared competences in the field of maritime transport. Member States are, in principle, allowed to act alone as long as the EU has not yet acted.⁶² It is true that Member States are facing infringement proceedings, e.g. *Commission v. Greece*, initiated by the Commission, as there is no clear division of the shared competence in the field of maritime transport. The point here is, assuming the EU accedes to the IMO and the IMO Conventions, any unilateral action of Member States could be easily identified as undermining the unity of EU’s international representation. Therefore, Member States may completely lose their freedom to act alone, a position which would be unacceptable to Member States now and in the foreseeable future. For example, as stated in The Netherlands’ position to the Green Paper on a Future Maritime Policy for the EU (2007):⁶³

Much has been achieved in recent years – not least through improved coordination and procedural arrangements – in terms of the EU’s contribution to international maritime forums. That line should be continued to further strengthen the EU’s role in

⁶¹ See supra note 63. See also supra note 65.

⁶² Art.2(2), TFEU.

⁶³ http://ec.europa.eu/maritimeaffairs/contributions_post/263netherlands_en.pdf 27.

those forums. In the opinion of the Netherlands that should be based mainly on shared substantive positions and agreements on the appropriate strategy and tactics rather than on institutional changes such as observer status or even EU membership as a goal in itself.

Such an approach would certainly be served by a more substantive and – in keeping with the Green Paper's aims – more integral balancing of interests and adoption of positions on the specific sectoral aspects of shipping. Substantive aims and priorities could form the basis for jointly deciding whether and how the EU can work as a catalyst for international agreement on measures considered important at European level. The Netherlands recognizes that EU legislation on safety and sustainability of shipping is increasing and for that reason does not necessarily reject the notion that institutional changes such as giving the Community observer status in the International Maritime Organization could demonstrably add value based on that substantive approach.

IV

CONCLUSIONS

The EU's accession to the IMO and the IMO Conventions may be met with external and internal legal constraints, which will be difficult to resolve. Externally, the EU lacks persuasive reasons for convincing other IMO members to go through the complex and very slow ratification process of inserting an REIO clause into the IMO Convention. It is also difficult to get support by two-thirds of the Parties to insert an REIO clause in most of Conventions adopted under the auspices of IMO. Even if the EU becomes a contracting party to the IMO Conventions, firstly it may not be able to contribute substantially and additionally to the rapid entry into force of the IMO Conventions due to the non-existence of a European flag; secondly, in the IMO decision making process, it will be difficult for the EU to acquire a further vote in addition to the votes of each of its member states.

Internally, there is potentially an imbalanced application of the “duty of loyalty”. This is of great concern to Member States. The EU's accession to the IMO and the IMO Conventions may result in a complete loss of Member States' right to act alone. Member States will not however be equipped to deal with an issue which is of great importance to them, but not to the EU. Consequently, the EU's initiative to gain full membership of the IMO and the IMO Conventions may not be supported by its Member States.

In conclusion, it is suggested that the EU shall not pursue the accession to the IMO in the foreseeable future.